Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)	)	CC Docket No. 01-338

OPPOSITION OF THE PACE COALITION AND TALK AMERICA INC. TO VERIZON'S PETITION FOR FORBEARANCE

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SUMMARY

Verizon has not demonstrated that it satisfies the statutory criteria for forbearance, and, therefore, the Commission must deny Verizon's petition to forbear from enforcing its obligation under section 271 of the Act to make available broadband elements that the Commission has exempted from unbundling under section 251 of the Act. As an initial matter, section 271 of the Act, by its own terms, explicitly prohibits the Commission from "limiting or extending" the competitive checklist, which is precisely the relief Verizon has requested.

Assuming arguendo that section 271(d)(4) does not prohibit the Commission from granting the requested relief, the Commission still must not grant Verizon's petition, because section 271 has not been fully implemented. Contrary to Verizon's assertion, a finding of compliance with the section 271 checklist is not tantamount to a finding that section 271 has been fully implemented for purposes of section 10 of the Act. Section 271 of the Act will not be fully implemented for purposes of section 10 until a competitive marketplace exists.

If, however, the Commission evaluates Verizon's forbearance request notwithstanding, then it must conclude that Verizon has failed to demonstrate that the statutory criteria for forbearance has been satisfied. Section 10 of the Act enumerates specific forbearance criteria, yet Verizon has failed – or even attempted – to satisfy the forbearance criteria. Instead, Verizon's petition rests on the erroneous and unfounded assumption that the forbearance criteria is satisfied because the Commission found, under section 251, that ILECs were not required to unbundle certain broadband network elements. As the Commission repeatedly has stated, section 271 establishes a separate and independent obligation on all Bell Operating Companies to make certain broadband network elements available. Furthermore, the impairment analysis set forth in section 251 is separate and distinct from the forbearance analysis in section 10, such that

the fact that the Commission has delisted a particular network element from (or never included in) the minimum list of UNEs is irrelevant for purposes of the forbearance analysis. Verizon has not satisfied the statutory forbearance criteria, and the Commission must deny its petition.

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The Promoting Active Competition Everywhere ("PACE") Coalition and Talk America Inc. ("Talk America"), through their attorneys, and in response to the Federal Communications Commission's ("Commission") *Public Notice* in the above-captioned proceeding, submit their opposition to Verizon's petition for forbearance.[1] The Commission must deny Verizon's petition to forbear from enforcing its obligation pursuant to section 271 of the Communications Act of 1934, as amended (the "Act"), to make available broadband elements that the Commission has exempted from unbundling under section 251 of the Act.

The PACE Coalition is composed of competitive local exchange carriers ("CLECs") that provide a variety of telecommunications services to business and residential consumers throughout the country.[2] Each PACE Coalition carrier and Talk America, also a

1 *See Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Docket No. 01-338, FCC 03-263 (Oct. 27, 2003) (stating that it would treat Verizon's *ex parte* letter dated October 24, 2003, as a forbearance petition).

2 PACE Coalition members include: ACCESS Integrated Networks, Inc.; ATX Communications, Inc.; Birch Telecom; BizOnline.com, Inc. d/b/a Veranet Solutions; BridgeCom International; DataNet Systems; DSCI Corp.; Ernest Communications; IDS Telcom LLC; InfoHighway Communications; ITC^DeltaCom Communications, Inc.;

CLEC, offers a form of bundled local exchange and long distance services, among other services. In providing their services to residential and small business customers, PACE Coalition carriers and Talk America use the combination of unbundled network elements ("UNEs") commonly referred to as UNE-P. Since the Commission already has excluded certain broadband network elements from the minimum list of UNEs (referred to as "delisting"), these carriers can obtain access to such broadband network elements only through section 271 of the Act. Without access to broadband network elements, competitive broadband deployment will diminish, thus frustrating the Commission's broadband deployment goals.

I. THE COMMISSION LACKS AUTHORITY TO GRANT THE REQUESTED RELIEF

Congress emphasized the necessity of continuing access to loops, switching, transport, and signaling by enacting a provision designed to circumscribe the Commission's ability to forbear from enforcing section 271 of the Act. By its own terms, section 271 of the Act prohibits the Commission from granting the requested relief. Section 271(d)(4) explicitly states that the "Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[3] Verizon has requested that the Commission forbear from requiring it to fulfill its broadband access obligations under the competitive checklist. Under the Act, Verizon has a continuing obligation – once granted 271 interLATA operating authority – to provide each of the network elements in the competitive checklist. Verizon could have opted out of these requirements by choosing not to obtain in-

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Granite Telecommunications; MCG Capital Corporation; MetTel; Microtech-Tel; Momentum Business Solutions Inc.; nii communications; Sage Telecom, Inc.; and Z-Tel Communications, Inc.

3 47 U.S.C. § 271(d)(4).

region, long distance operating authority, but did not do so. As long as Verizon continues to offer interLATA service, it must comply with the network access requirements set forth in section 271. Verizon essentially has asked the Commission not only to limit and modify the checklist items by requesting that the obligations apply only to narrowband services – which the FCC lacks the authority to do – but also to *eliminate* certain checklist obligations. If the Commission cannot limit the checklist, then clearly it cannot remove an obligation to make a network element available.

II. THE PREREQUISITE TO CONDUCTING A FORBEARANCE ANALYSIS HAS NOT BEEN SATISFIED

Assuming arguendo that section 271(d)(4) does not prohibit the Commission from forbearing from enforcing Verizon's obligations to make broadband network elements available under section 271, Verizon's petition is not ripe, because section 271 has not been fully implemented. Pursuant to section 10 of the Act, "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[4] In other words, section 10(d) prohibits the Commission from forbearing from section 271 enforcement until that section as a whole – not just the competitive checklist – has been fully implemented. Section 271 will not be fully implemented, however, until a competitive marketplace exists.

Contrary to Verizon's assertion, a finding of compliance with the section 271 checklist is not tantamount to a finding that section 271 has been "fully implemented" for purposes of section 10. Nowhere in the statute does it suggest that a BOC is not required to provide loops, transport, switching, and signaling once it has obtained section 271 authority.

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[4] 47 U.S.C. § 160(d).

Indeed, as stated above, under the express language of the Act, Verizon has a continuing obligation to provide these network elements to requesting carriers after the Commission has granted its application to provide in-region interLATA service. Moreover, the anti-backsliding provisions set forth in section 271 demonstrate that there is no merit to Verizon's claim that section 271 has been fully implemented. Section 271(d)(6) provides for a range of penalties if the "Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval,"[5] and authorizes various remedies, including suspension of interLATA authority and fines. If section 271 is "fully implemented" once the BOC has satisfied the competitive checklist, then there would not be any need to maintain anti-backsliding provisions. Therefore, satisfying the competitive checklist for purposes of obtaining in-region interLATA authority is not equivalent to fully implementing section 271 of the Act.

Section 271 of the Act will not be fully implemented for purposes of section 10(d) until a competitive marketplace exists. In other words, the "fully implemented" language requires the Commission to find that there is a functioning wholesale market in a geographic area in which, among other things, download pricing pressure is consistently exerted on wholesale elements and competitors are able to obtain what they need to serve end-users, and in which there is some assurance that the wholesale market will continue to function in the absence of an unbundling requirement. Then, and only then, can the question of whether section 271 has been "fully implemented" be considered. The existence of a mature wholesale market not only will protect consumers and other competitors, but also will ensure that each mode of entry that Congress authorized in section 271 will continue to be viable in the absence of that provision. Section 271 cannot be said to have been fully implemented until such time as competition has

5 47 U.S.C. § 271(d)(6).

taken root and each mode of local market entry that Congress envisioned is available in the absence of regulatory oversight.

In requiring section 271 to be fully implemented, Congress did not permit the Commission to parse various network elements or categories of services. In other words, a fully competitive marketplace must exist for all services; the Commission cannot claim, as Verizon would argue, that a competitive marketplace for broadband services – which does not exist in any event – is sufficient to satisfy the fully implemented standard for purposes of forbearing from section 271 enforcement with regard to broadband services.

The competitive marketplace still is in the nascent stages of development seven years after passage of the 1996 Act. Verizon and the other BOCs have retained control of the bottleneck facilities necessary to provide service. The Supreme Court noted this fact, stating that BOCs "have an almost insurmountable competitive advantage" owing mostly to their control of loops, transport, and switching.[6] This is true with regard to both narrowband and broadband services. Indeed, in the *Triennial Review Order,* the Commission found that it must continue to require ILECs to offer unbundled access to stand-alone mass market loops used for the provision of broadband services.[7] In doing so, the Commission emphasized, regardless of whether the carrier is providing a broadband or a narrowband service, that loop costs are largely fixed and sunk and that ILECs already enjoy a large subscriber base.[8] Therefore, the competitive marketplace does not exist such that section 271 has been fully implemented for purposes of section 10(d).

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6 *Verizon Communications, Inc. v. FCC,* 122 S.Ct. 1646, 1662 (2002).

7 *See Triennial Review Order* ¶¶ 199, 237.

8 *See id.* ¶ 237.

III. VERIZON HAS FAILED TO SATISFY THE FORBEARANCE CRITERIA

Verizon's argument that the Commission should forbear from enforcing the explicit requirement in section 271 that it make available broadband network elements rests entirely on its erroneous assumption that the forbearance criteria is satisfied because the Commission found, under section 251, that ILECs were not required to unbundle these same broadband network elements. The PACE Coalition and Talk America submit that the Commission should not reach the forbearance analysis because the statutory prerequisite – full implementation of section 271 – has not yet occurred. If the Commission evaluates Verizon's forbearance request notwithstanding this patent defect, then it must conclude that Verizon has failed to demonstrate the statutory criteria for forbearance has been satisfied.

Section 10 of the Act enumerates specific criteria that must be satisfied in order to grant forbearance. Pursuant to section 10 of the Act, the Commission cannot forbear from requiring Verizon to make available broadband network elements under section 271 unless:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[9]

In determining if forbearance is in the public interest, the Commission must consider whether "forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among

[9] 47 U.S.C. § 160(a)(1)-(3).

providers of telecommunications services."[10] Verizon, however, virtually ignores section 10 of the Act, instead providing a litany of reasons that have no bearing on the forbearance criteria.

A. Section 271 Establishes a Separate and Independent Obligation on all BOCs To Make Available Broadband Network Elements

Verizon makes myriad arguments to support its position that it should not be required to make available broadband network elements that the Commission has delisted under section 251.[11] Not one of these arguments can be supported by law. The Commission repeatedly has emphasized that section 271 of the Act imposes a separate and distinct obligation on all BOCs, including Verizon, to make available network elements regardless of whether the network element is included in the minimum list of UNEs. In requiring BOCs to make network elements available under section 271, the Act does not distinguish between elements used to provide narrowband service and those used to provide broadband service. Moreover, the impairment analysis set forth in section 251 is separate and distinct from the forbearance analysis in section 10, such that the fact that the Commission has delisted a particular network element from (or never included in) the minimum list of section 251(c)(3) UNEs is irrelevant for purposes of the forbearance analysis.

1. Verizon Has a Continuing Obligation to Make Broadband Network Elements Available Even if the Commission Has Delisted those Network Elements Under Section 251

The premise upon which Verizon bases its petition for forbearance is false: the Commission's decision not to require ILECs to unbundle certain broadband network elements under section 251 does not affect Verizon's obligation to make available those same network

10 47 U.S.C. § 160(b).

11 Verizon's petition for forbearance is limited to "the broadband elements that the Commission has found do not have to be unbundled under section 251, including fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching." *Ex Parte* Letter to Commissioners from Suzanne A. Guyer, Verizon at 1 (Oct. 24, 2003).

elements under section 271 of the Act. In its petition for forbearance, Verizon argues that it should not be required to unbundle any broadband network element that the Commission has excluded from the section 251 unbundling obligations.[12] The Commission already has rejected Verizon's claim that checklist items four through six and checklist item ten do not impose an independent obligation on BOCs to make available network elements that have been delisted. In the *Triennial Review Order,* the Commission correctly reaffirmed that a BOC's obligation to provide network elements under section 271 of the Act is independent of its obligation under section 251(c)(3) of the Act.[13] Indeed, the Commission emphasized that "the plain language and structure of section 271(c)(2)(B) establishes that BOCs have an independent and *ongoing* access obligation under section 271."[14] This obligation applies to all BOCs equally, and the Commission must reject Verizon's attempt to eviscerate section 271 of the Act.

Pursuant to section 251(c)(3) of the Act, ILECs, such as Verizon, are required "to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis ...."[15] Under section 271, BOCs – a subset of LECs – are required to make available the following network elements that the Commission previously had required to be unbundled to requesting carriers: (1) local loop transmission; (2) transport; (3) local switching; and (4) signaling.[16] Specifically, under section 271 of the Act, all BOCs, including Verizon, must provide these network elements in order to be eligible to obtain

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12 *See* Verizon Petition at 4 (stating that "checklist items 4 through 6 are, in any event, reasonably construed not to require the unbundling of broadband loop or switching elements excluded from the section 251 unbundling list").

13 *See Triennial Review Order* ¶¶ 645-57.

14 *Id.* ¶ 654 (emphasis added).

15 47 U.S.C. § 251(c)(3).

16 *See Triennial Review* ¶ 650 (stating that four of the "checklist items relate to network elements in earlier orders that the Commission has deemed to be UNEs under the standards of section 251(c)(3)").

authority to offer in-region interLATA services. The obligation to provide these network elements is wholly separate from whether the network elements is unbundled pursuant to section 251 of the Act.

Congress specifically carved out the entities to whom the requirements would apply and the particulars of such requirements. The Commission correctly explained that, by its own terms, section 251 applied to all ILECs, whereas section 271 applies only to BOCs, a category of ILECs.[17] Congress designed section 271 to address the BOCs' long-held monopoly over local telecommunications services and to condition BOC entry into the long distance market on the opening of the local exchange market to competition.[18] If Congress had intended for sections 251 and 271 to be co-extensive, it would not have differentiated between ILECs and BOCs.

2. The Unbundling Analysis in Section 251 Is Distinct from the Forbearance Analysis in Section 10 of the Act

There is no merit to Verizon's argument that a finding of no impairment under section 251 necessitates forbearance from making available that same network element under section 271 of the Act.[19] Verizon's argument squarely contradicts the plain language of the statute, Congress's intent, and the Commission's repeated and persistent statements that sections 251 and 271 establish independent unbundling obligations. If the Commission were to accept Verizon's premise as true, then Verizon would not have an obligation under section 271 to make available any loops, switching, transport, or signaling that the Commission had delisted under

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17 *See id.* ¶ 655.

18 As to the Commission recognized in the *Triennial Review Order,* section 271 was direct result of the modification of final Judgment (MFJ), which established the terms for the settlement of the Department of Justice's antitrust suit against AT&T. *See Triennial Review Order* at note 1986 (citing *United States v. Western Elec. Co.,* 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., *Maryland v. United States,* 460 U.S. 1001 (1983)).

19 *See* Verizon Petition at 6.

section 251. Under this interpretation, there is no need for Congress to have created a separate obligation in section 271 of the Act; Verizon's interpretation does not give any meaning to section 271 of the Act, and must be rejected.

Moreover, the unbundling analysis in section 251 is distinct from the forbearance analysis in section 10 of the Act. The impairment analysis in section 251(d)(2)(B) focuses on whether preventing a requesting carrier from having access to a UNE would impair the carrier from offering the services that it seeks to offer.[20] In contrast, section 10 focuses on whether forbearance will undermine statutory or regulatory requirements that ensure that services are provided in a just, reasonable, and nondiscriminatory manner.[21] These inquiries are distinct, and, therefore, the fact that the Commission has concluded that a carrier is not impaired without access to a network element is not determinative of whether the forbearance standard has been met.

3. Verizon's Obligation To Make Broadband Network Elements Available Continues After it Has Received Section 271 Authority

Verizon next attempts to skirt its obligation to provide broadband network elements by claiming that its obligation to make available the network elements enumerated in section 271 ended once Verizon obtained in-region interLATA authority under section 271 of the Act.[22] Again, the Commission must reject Verizon's argument to evade its statutory obligations to provide access to loops, switching, transport, and signaling under section 271 of the Act. Section 271 establishes an on-going obligation to make these network elements available, regardless of the purpose for which they are used. The anti-backsliding provisions set forth in section 271 demonstrate that a BOC has a continuing obligation to make certain network

20 *See, e.g., Triennial Review Order* ¶ 164.

21 47 U.S.C. § 160.

22 *See* Verizon Petition at 13.

elements available after its section 271 application has been approved. Indeed, section 271(d)(6) provides for a range of penalties if the "Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval,"[23] and authorizes various remedies, including suspension of interLATA authority and fines.

4. Under Section 271 of the Act, Verizon is Required to Make Available Broadband Facilities to Requesting Carriers

Under the plain language of section 271 of the Act, as a BOC that has obtained section 271 authority, Verizon is required to provide loops, transport, local switching, and signaling to requesting carriers. Section 271 does not contain any exceptions to this absolute requirement; it makes no distinction, for example, between loops used to provide broadband services and those used to provide more traditional narrowband services.[24] Accordingly, the Commission must reject Verizon's claim that Congress did not intend for section 271 of the Act to apply to broadband services.[25]

B. Verizon Has Failed To Satisfy the Explicit Statutory Criteria

At no point in its petition does Verizon demonstrate, or even attempt to demonstrate, that the statutory criteria for forbearance have been satisfied. The reason is simple: Verizon cannot satisfy this criteria. As stated above, this test is distinct from the impairment test set forth in section 251 of the Act; a finding of no impairment is irrelevant for purposes of the forbearance test. Verizon's only discussion of section 10 is a brief conclusory statement that the Commission's findings in the *Triennial Review Order* that removing unbundling obligations will

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23 47 U.S.C. § 271(d)(6).

24 The Commission consistently interpreted section 271's requirement to provide unbundled '[l]ocal transmission" to mandate unbundling of loops used to provide both broadband and narrowband services. *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Telecommunications Act to Provide In-Region, InterLATA Service in the State of New York,* 15 FCC 3953, 4095-127, ¶¶ 268-342 (1999).

25 *See* Verizon Petition at 15-16.

stimulate broadband deployment in furtherance of section 706(a) "are equivalent to the three core findings required for forbearance under section 10(a) ...."[26] Verizon, however, does not even accurately identify the three-part forbearance test. For example, Verizon wholly ignores the requirement that the Commission must find that forbearance is not necessary to ensure that rates, charges, and practices are just and reasonable and nondiscriminatory.[27]

Furthermore, Verizon has not demonstrated that forbearance from enforcing the competitive checklist will benefit consumers. In support of its forbearance request, Verizon emphasizes – correctly – that forbearance will benefit one entity in particular: Verizon. Indeed, Verizon claims that the Commission should forbear from enforcing section 271 of the Act with regard to specific broadband network elements because to do otherwise would require Verizon to redesign its network architecture.[28] At no point does Verizon ever state – let alone present any evidence – that forbearance will benefit consumers.

Nor has Verizon demonstrated that forbearance is in the public interest. Verizon's petition has broad industry-wide implications that are inappropriate to address in the context of this forbearance petition. Verizon claims that forbearance will facilitate the Commission's goal of broadband deployment in furtherance of section 706 of the Act. Verizon has not provided the Commission with any evidence that forbearance will promote broadband deployment or that it will promote competition in the marketplace, one of the determinative factors in a forbearance analysis. Accordingly, the Commission must deny Verizon's petition.

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26 *Id.* at 8.

27 *Id.* (claiming that the three criteria are "protection of either consumers or other carriers (47 U.S.C. § 160(a)(1), (2)), and ...public interest (47 U.S.C. § 160(a)(3)).

28 *See id.* at 2, 9-11.

IV. CONCLUSION

For the foregoing reasons, the PACE Coalition and Talk America respectfully request that the Commission deny Verizon's request to forbear from requiring it to make available broadband network elements in accordance with section 271 of the Act for which the Commission has determined should not be unbundled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer Kashatus, certify that on this 17th day of November 2003, I served the foregoing Opposition to Verizon's Petition for Forbearance on the following:

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